

EX PARTE OR LATE FILED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

ORIGINAL

In the matter of)

Implementation of Section)
309(j) of the Communications Act)

PP Docket No. 93-253

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TO: The Commission

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REQUEST FOR CLARIFICATION

Two Way TV, Inc. ("Two Way TV") by its attorney, hereby requests the Commission to clarify of its *Fourth Report and Order*, 75 RR 2d 188 (1994), in connection with the recent Interactive Video and Data Service ("IVDS") auction, held July 28-29, 1994. Two Way TV is entitled to the Designated Entity ("DE") credit the Commission made available to one applicant in each market. The Commission's rules are unclear as to how DE credits are awarded when a high bidder defaults and therefore Two Way TV seeks clarification.

I. BACKGROUND.

1. Section 95.853 of the Commission's rules provides that there are two frequency segments in each IVDS market, however only one DE credit may be awarded per market. See Section 95.816(d)(1). Accordingly, if the highest bidder claims DE credit for the segment of its choice, the high bidder for the other segment must take the market without DE credit, even if it otherwise would be eligible for the credit.

2. Two Way TV participated in the auction and is the high bidder for the "B" segment in the San Antonio, MSA. On September 22, the Commission released a *Public Notice* (Report No. DA 94-1031) announcing that Two Way TV's application (File No. 840043) has

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been accepted for filing. Two Way TV is not aware that any petitions to deny its application have been filed, and fully expects its application to be granted.

3. Two Way TV entered the auction eligible for DE credit by virtue of the fact that it is a minority and female owned company as defined by the Commission's rules. Interactive America Corporation ("IAC") was the highest bidder for San Antonio segment "A" and claimed the only available DE credit. Two Way TV was the second highest bidder and took the market at face value, since at the time of the auction it was not eligible to obtain the DE credit claimed by IAC.

4. IAC has defaulted. By *Public Notice* of August 17, 1994, the Commission announced that IAC failed to make its required down payment and failed to file its FCC Form 574 application.

II. TWO WAY TV REQUESTS THE COMMISSION TO AWARD IT IAC'S "DE" CREDIT

5. Two Way TV is unconcerned whether IAC was an insincere bidder. Two Way TV simply requests the Commission to declare that Two Way TV will receive the DE credit claimed by IAC. There are several valid public interest reasons to clarify the rules as requested by Two Way TV.

6. In its *Fourth Report and Order*, the Commission discussed its options when a winning bidder defaults:

In an oral auction, a winning bidder that...fails to remit the required down payment or balance of its winning bid in the time frame specified, will be deemed to have defaulted....In such instances, we may re-auction the license or offer it to the next highest bidder(s). 75 RR 2d at 195.

The Commission already retains the option to transfer a defaulted license to the next highest bidder. Surely a DE credit could be transferred as well. In this case, the Commission may permit Two Way TV to keep its "B" segment, award it IAC's DE credit, and re-auction the "A" segment.¹

7. There is relevant precedent for the proposition that the San Antonio DE credit should transfer to Two Way TV. Upon information and belief, the high bidder for Market No. 209, Clarksville-Hopkinsville, TN-KY, which bidder claimed DE credit, withdrew its bid following completion of the auction for Market 209 but before the entire auction closed. MAR Partnership ("MAR"), the second highest bidder in the market requested the Commission to award it the DE credit claimed by the withdrawing bidder. The Commission consented, awarded the DE credit to MAR, and re-auctioned the market without DE credit.

8. There is no legal or practical difference between the facts of Market 209 and those of Market 33. Likewise, there is no reason for the Commission to deny to Two Way TV what it has already awarded to MAR. Two Way TV simply requests the Commission to clarify its *Fourth Report and Order* to ensure that like parties are treated in a like fashion.²

9. Finally, there is a strong public interest reason for granting the clarification requested by Two Way TV. Two Way TV is a *bona fide* bidder who was willing to pay more for the market than any other *bona fide* bidder. But for IAC's high bid, Two Way TV would

¹ The other licenses obtained by Two Way TV are all "B" segments. Two Way TV does not wish to hold the "A" segment for San Antonio.

² The Courts have long held that an agency must provide adequate explanation before it treats similarly situated parties differently. *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir.1994); *See also, New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 366 (D.C. Cir.1987), *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir.1965).

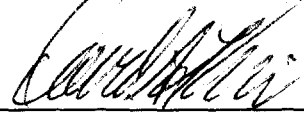
have been entitled to the DE credit for the San Antonio market. Now that IAC has defaulted, it is only fair that the Commission reward Two Way TV, a sincere bidder who outbid all other sincere bidders. This relief should be provided across the board to all similarly situated bidders.

III. CONCLUSION.

For all of the reasons stated above, Two Way TV respectfully requests the Commission to clarify its *Fourth Report and Order* to provide that Two Way TV is entitled to the DE credit preliminarily claimed by IAC before its default. Two Way TV's payment obligations should be properly adjusted to reflect its status as a *bona fide* Designated Entity.

Respectfully submitted,

TWO WAY TV, INC.

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